CHEAN SIONG GUAT v. PUBLIC PROSECUTOR

[A.Cr.J. (Abdul Hamid J.) March 24, 1969]
[Seremban — Criminal Appeal No. 27 of 1968]

Gaming — Public lottery — Assisting in the carrying on of — Characters lottery — Common Gaming Houses Ordinance, 1953, s. 4(1)(c).

Evidence — Discrepancies — Value of testimony — Incriminating evidence — Evidence Ordinance, 1950, s. 132(2) — Rejection of evidence of defence witness — Interpretation of documents in exhibit.

The appellant had been convicted on a charge of assisting in the carrying on of a public lottery contrary to the Common Gaming Houses Ordinance, 1953 section 4(1)(c), and was sentenced to a fine of $800 or in default 5 months' imprisonment. On appeal it was urged that the learned magistrate erred in law as well as in fact, (1) in holding that the discrepancies in the evidence between two prosecution witnesses were trivial; (2) in not affording the appellant a proper opportunity to present his case fully and effectively; (3) in holding that the credit of a defence witness was impeached; (4) in adducing further evidence.

Held, dismissing the appeal: (1) if, after considering the discrepancies, a magistrate finds that they do not detract from the value of the testimony of the witness or witnesses, it would then be proper for him to regard them as trivial and ignore them. On the other hand, if he finds that they relate to a material point which would seriously affect the value of the testimony of the witness or witnesses, then it would be his duty to weigh the evidence carefully in arriving at the truth. In this case, what the learned magistrate in fact found was that the discrepancies were minor and he quite properly ignored them;

(2) a witness may be compelled to answer a question, the answer to which will criminate or may tend to directly or indirectly criminate him, but, it is the duty of the court before compelling him to so answer, to explain to the witness the purport of section 132(2) of the Evidence Ordinance, 1950;

(3) in the circumstances of the case the learned magistrate was right in rejecting the evidence of the defence witness in question. It was a question of fact for the magistrate to decide, and he found that the witness had given two conflicting versions touching upon a material issue;

(4) in this case the request by the learned magistrate to the interpreter to interpret some Chinese characters appearing in some of the exhibits did not amount to adducing further evidence.

Cases referred to:—

(1) *Muthusamy* v. *Public Prosecutor* [1948] M.L.J. 57.

(2) *Public Prosecutor* v. *Abdul Hamid* [1969] 1 M.L.J. 53.

(3) *Ang Chwee Keong* v. *R.* [1955] M.L.J. 36.

(4) *Woo Chin Chong & Ors.* v. *Public Prosecutor* [1956] M.L.J. 130 at p. 131.

MAGISTRATE'S CRIMINAL APPEAL.

K. D'Cruz for the appellant.

Hassan bin Ishak (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Abdul Hamid J.: This is an appeal against the decision of the magistrate who convicted the appellant on a charge under section 4(1)(c) of the Common Gaming Houses Ordinance, 1953, whereby the appellant was sentenced to a fine of $800 or in default 5 months' imprisonment. The charge reads as follows:—

"That you on 25th day of December, 1966 at about 2.15 p.m. at No. 21 Batu 8, Labu Road, Seremban, in the District of Seremban, State of Negri Sembilan did assist in the carrying on of a public lottery and that you have thereby committed an offence punishable under section 4(1)(c) of the Common Gaming Houses Ordinance 26 of 1953."

The facts are briefly as follows:—

"On or about the 25th of December, 1966, A.S.P. Harun bin Ismail (P.W.1) led a police party to a shop No. 21 of Batu 8, Labu Road, Seremban. Together with one detective police constable (P.W.2) P.W.1 went to a room through the shop. He detailed P.W.2 to stand guard at the door of the room while he entered the room.

He noticed the accused in the room alone; he appeared to be writing. Near the table he recovered some documents and on searching the person of accused he recovered further documents.

P.W.3 gave expert evidence and stated that Exhibits P.2 A-D and P.5A were records of stakes pertaining to 1,000 and 10,000 character lottery."

At the hearing of this appeal the learned counsel for the appellant raised a number of grounds. He submitted that the learned magistrate erred in law as well as in fact in holding that the discrepancies in the evidence between P.W.1 and P.W.2 were trivial. In dealing with these discrepancies, the learned magistrate said: "To my mind these contradictions were minor differences and they do not affect the case in that the exhibits were found in possession of accused." He went on to cite a passage from *Sarkar* on Evidence, 10th edition at page 46 under the heading "Discrepancies" which states:—

"Discrepancies in the testimony of various witnesses on material or broad points have to be carefully weighed in arriving at the truth. But trifling discrepancies should be ignored as they are often a test of truth."

The magistrate ignored these discrepancies. Discrepancies may, in my view, be found in any case for the simple reason that no two persons can describe the same thing in exactly the same way. Sometimes what may appear to be discrepancies are in reality different ways of describing the same thing, or it may happen that the witnesses who are describing the same thing might have seen it in different ways and at different times and that is how discrepancies are likely to arise. These discrepancies may either be minor or serious discrepancies.

Absolute truth is I think beyond human perception and conflicting versions of an incident, even by honest and disinterested witnesses, is a common experience. In weighing the testimony of witnesses, human fallibility in observation, retention and recollection are often recognised by the court. Being a question of fact, what a magistrate need do is to consider the discrepancies and say whether they are minor or serious discrepancies. If, after conthem. On the other hand, if a magistrate finds that the discrepancies do not detract from the value of the testimony of the witness or witnesses, it would then be proper for him to regard the discrepancies as trivial and ignore them On the other hand, if a magistrate finds that the discrepancies relate to a material point which would seriously affect the value of the testimony of the witness or witnesses, then it would be his duty to weigh the evidence carefully in arriving at the truth. In the present case, what the learned magistrate in fact found was that the discrepancies were minor and he quite properly ignored them.

Counsel for the appellant also submitted that the learned magistrate erred in law in not affording the appellant a proper opportunity to present his case fully and effectively. I gather from the record that in the court below the learned counsel for the accused, after showing to the witness (D.W.2) the exhibits relating to character lottery, asked him — "To whom these documents belong?" and at this juncture the learned magistrate interrupted and asked the witness whether he voluntarily wished to answer the question put by the defence counsel. The witness replied: "I do not want to answer that question for fear I would be incriminated." It is not clear what actually transpired. However, it is gathered that the learned counsel requested the magistrate to record the statement from the Bench saying — "put the question to witness. He must answer." On examining the record, I must say that I could not find any substance in this ground. The circumstances did not purport to show that the appellant was denied the proper opportunity to present his case fully and effectively. In my opinion, the learned magistrate acted most properly and judiciously. It seems clear that in law a witness may be compelled to answer such question. Section 132 of the Evidence Ordinance reads:—

"132. (1) A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of any Government in the Federation or of any other person.

(2) No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

(3) Before compelling a witness to answer a question the answer to which will criminate or may tend directly or indirectly to criminate such witness, the court shall explain to the witness the purport of subsection (2) of this section."

However, it is the duty of the court before compelling a witness to answer such question, the answer to which will criminate or may tend to directly or indirectly criminate such witness, to explain to the witness the purport of subsection (2) of section 132. This apparently the learned magistrate did not do. Nevertheless, in my view, there was in this case no mis-carriage of justice. Counsel for the accused intimated to the court that he did not wish to proceed any further because the defence had been deprived of its right to present its case. It was unfortunate that counsel should think fit to take this course.

Counsel for the appellant further submitted that the learned magistrate erred in law in holding that the credit of D.W.2 was impeached. On review of the evidence, I found that the magistrate did allow the prosecuting officer, after he (the magistrate) had apparently seen the witness's statement to the police, to cross-examine the witness by reading to him the relevant portion of the statement. The witness denied having made the statement and the prosecution subsequently proved the statement. In my opinion, the procedure followed by the learned magistrate was in no way a departure from the established practice. (See *Muthusamy* v. *Public Prosecutor* [1]).

In the circumstances, the learned magistrate quite rightly rejected the evidence of D.W.2. It was a question of fact for the magistrate to decide, and he found that the witness had given two conflicting versions touching upon a material issue.

The only other ground raised by the appellant was that the learned magistrate erred in law in adducing further evidence. After both the prosecuting officer and the defence counsel had made their submissions, the learned magistrate requested a Chinese interpreter to interpret some Chinese characters appearing in some of the documents (Ex. P.4). The learned counsel cited the case of *Public Prosecutor* v. *Abdul Hamid* [2] where the learned magistrate adjourned the case to call two witnesses to give evidence after the defence evidence. This case has no application I think to the facts of the present case. No further evidence was adduced by the court. The Chinese characters which

were requested to be translated by the learned magistrate were those appearing on the documents tendered and admitted as exhibits by the court. The learned counsel argued that there must be proper translation by the court interpreter. He cited the cases of *Ang Chvee Keong* v. *R.*,[3] and *Woo Chin Chong & Ors.* v. *Public Prosecutor.*[4] From the record, I found that the translation requested by the magistrate related only to certain Chinese characters appearing in some pages of the exhibits, those Chinese characters which the police expert witness was unable to read. After examining the exhibits and after considering the testimony of the police expert witness, I am satisfied that no person acting judicially and properly instructed as to the relevant law could have come to any other conclusion, i.e. that these exhibits related to character lottery. The learned counsel for the appellant contended that the learned magistrate entertained a reasonable doubt when he requested the translation to be made. Having read the grounds of judgment of the learned magistrate, I am unable to agree with this contention. In my opinion, there was, in the circumstances of this particular case, nothing irregular or improper for the magistrate in requesting the interpreter to translate these Chinese characters. I do not however say that such a practice is satisfactory. It is I think desirable that when documents are tendered as exhibits and where the prosecution or the defence wish to rely on these exhibits, they should be properly translated.

In the light of the reasons given above, I would therefore dismiss the appeal against conviction. As regards sentence, the learned magistrate erred, if at all, in failing to consider that the sentence imposed should have some deterrent effect. Though the fine imposed, I think, was in the circumstances not quite adequate, I do not propose to interfere with it. Appeal against sentence is dismissed.

Appeal dismissed.

Solicitors: *Joseph & Sons.*

PUBLIC PROSECUTOR v. MA'ARIF

[A.Cr.J. (Abdul Hamid J.) March 24, 1969]
[Seremban — Criminal Appeal No. 29 of 1968]

Criminal Law and Procedure — Appeal — Fact, question of — Appeal on ground of decision against weight of evidence — Principles applicable.

A magistrate's decision should not be reversed on the ground of its being against the weight of evidence; however, there is no reason why this should not be done if it were found that the decision was grossly against the weight of the evidence.

Case referred to:—

(1) *In re A.B. Ltd.* [1956] M.L.J. 197.

MAGISTRATE'S CRIMINAL APPEAL.

R. Padmanabhan (Deputy Public Prosecutor) for the appellant.

K. D'Cruz for the respondent.

Cur. Adv. Vult.

Abdul Hamid J.: This is an appeal by the public prosecutor against the decision of the learned president of the sessions court acquitting the respondent on a charge under section 4(c) of the Prevention of Corruption Act, 1961. The charge reads as follows:—

"That you on 10th February, 1968 at the Public Works Department Office, Kuala Pilah, in the District of Kuala Pilah, in the State of Negri Sembilan, being an agent of the Government of Negri Sembilan, to wit, a junior technician (Road) knowingly used with intent to deceive your principal a document, to wit, Check Roll No. 4 issued on 9th January, 1968 being Check and Pay Roll of labour employed under Jurutera Kerja, Kuala Pilah in respect of wages and overtime pay in respect of which your principal is interested, and which document contains a statement which is false in material particular namely it stated that overtime work had been performed which statement to your knowledge was intended to mislead your principal and that you have thereby committed an offence punishable under section 4(c) of the Prevention of Corruption Act, 1961."

Briefly, the facts of this case were that the respondent was a junior road technician attached to the Public Work Department Office, Kuala Pilah. The respondent had under his control four gangs of labourers. The respondent's duties were to muster the gangs everyday and to give them their work. Normal working hours will be from 6.30 a.m. to 2.30 p.m. and work after 2.30 p.m. will be charged overtime. For overtime work, prior approval of the technical assistant should be obtained and transmitted to the executive engineer, unless there was an emergency in which case the respondent could authorise the work. There was in this case no prior approval given.

The respondent was also responsible for entering the check rolls daily and to complete it by the end of the month for payment.

On or about 10th February, 1968, the respondent submitted Exhibit P.4 the check roll containing claims for overtime as regards the gang of labourers under his charge. The check roll contained claims for overtime of some of the labourers who did not in fact perform the overtime as claimed.

The appellant raised a number of grounds mainly on questions of fact. The learned president in his grounds of judgment dealt with the evidence of P.W.1 who stated that he saw the respondent writing on the check roll. The president came to the conclusion that the cir-